

## Lawyers of Colour and Racialized Immigrants with Foreign Legal Degrees: An Examination of the Institutionalized Processes of Social Nullification

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*"Law [societies] should be more of a mirror of society – and the society we've become – if it is to have a truer perception of the public interest and a more self-conscious awareness of its role and responsibility in the creation of our new citizenry. And this starts with greater equity and equality in the legal profession itself."*

(Her Excellency the Right Honourable Adrienne Clarkson upon the occasion of receiving an Honorary Doctorate of Laws Degree).<sup>i</sup>

### Abstract

This analysis will deconstruct the legal profession as a cultural force that justifies the discounting of credentials and accreditation blockage imposed on lawyers of colour as a market contingency, rather than a political action. Through this deconstruction, the study will demonstrate how the practice of Law in Canada valorizes diversity at the same time that it actively suppresses it, by providing racialized lawyers equal access to the profession but *not* access as equals. The key public policy hypothesis of this work is that in a globalized society that strives to be as inclusive as possible, it is vital that a profession like the Law begin to make sense of its own diversity challenge beyond its narrow status as a labour market issue.

### Introduction

Richard Devlin (1996) posed the fundamental diversity-audit question for the legal profession in the age of globalized law practice: "Is it Justice or Just Us?" Subsequent research has confirmed that while the broad mandate of the legal profession in Canada is to uphold and ensure the cause of justice, it is still lacking with respect to equity and a level-playing field within the profession itself, particularly as it relates to racialized lawyers (see Brockman 1991; Neallani 1992; Malcolm 1992; Sparks 1993; Pendakur 1999; Cooper, Brockman and Hoffart 2004; Fay et al. 2004; Ornstein 2004).

Law societies and law schools all have justice and equity mandates that revolve around the basic tenets of liberal thought—in terms of commitments to open access, altruistic service and the public good, a guarantee of professional competence, and the morality and integrity of professional activities. The Federation of Law Societies of Canada (FLSC), for instance, defines itself as "a leading voice on the national and international scene in respect of the pillars to our system of justice which are crucial to protecting the public interest."<sup>ii</sup> The expressed mandate of the Law Society of Upper Canada (LSUC) is "to govern the legal profession in the public interest by ensuring that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional conduct, and by upholding the independence, integrity and honour of the legal profession."<sup>iii</sup> The Canadian Bar Association (CBA) is "committed to improving the law, the administration of justice and access to justice...and promoting

equality in the legal profession and in the justice system.”<sup>iv</sup> Meanwhile, recent statistical profiles, academic studies, research reports generated by provincial law societies, studies undertaken by national bodies such as the Canadian Bar Association (see St. Lewis and Trevino 1999; St. Lewis 1999), and most importantly the recounted experiences (or ‘first order accounts’) of minorities themselves all attest to the persistence of bias and inequities against lawyers from racialized communities.

In spite of avowed diversity awareness in the legal profession, non-White lawyers consistently lagged behind White lawyers in every substantively significant category—including representation, status and pay. First, as Michael Ornstein (2004) has recently documented, visible minority communities identified by Statistics Canada, account for fewer lawyers than their share of the population. Presently, for instance, the representation of Aboriginal persons in the legal profession is only about 40 percent of their share of the Ontario labour force, while the figure for members of visible minorities is about 50 percent (Ornstein 2004: 5). In 2001, 0.6 percent of Ontario lawyers were Aboriginal persons, 9.2 percent were members of visible minorities, and 90.2 percent were White; the estimated numbers are 175 Aboriginal lawyers, 2,535 lawyers from visible minority groups and 24,855 White lawyers. In comparison, the Census shows that Ontario population includes 1.6 percent Aboriginal persons, 19.0 percent members of visible minorities, and 79.4 percent White persons. Considering only members of the labour force, there are 1.4 percent Aboriginal persons, 18.2 percent members of visible minorities and 80.4 percent White persons (Ornstein 2004:2) [see Table 1].

Secondly, there are also proportionally fewer visible minority lawyers than there are visible minorities in other professions. In Ontario, visible minorities account for 9.2 percent of the total, compared to 25.9 percent of physicians who are from visible minority communities, 27.3 percent of engineers, 15.2 percent of university professors, and 11.2 and 15.7 of high- and middle-level managers respectively [see Table 2]. Finally, consider that the median annual income to begin the new millennium for all Aboriginal and visible minority lawyers (combined) was \$59,000, compared to \$90,000 for White lawyers. In addition, Aboriginal and visible minority lawyers were more likely than White lawyers to have very low incomes, fewer had moderate incomes, and far fewer had very high incomes (Ornstein 2004:2) [see Table 3].

These racialized disparities are consistent across provincial jurisdictions. Noting this paradox of justice in the legal profession, the Equity Advisor at the Canadian Bar Association, Charles Smith (2002), candidly acknowledged

It is interesting and somewhat paradoxical that the very profession which has been the source of such insight and eloquence on equality requires a healthy dose of self-examination and positive action to address inequality and outright discrimination within its own ranks.

This study examines the contradiction between the diversity mandate of the legal profession and how it actually works for lawyers of colour. It argues that this theory-and-practice *paradox of justice* is not the result of blatant acts of racism; it is the result of failing to effectively frame the diversity challenges and benefits of a multicultural society in a way that can produce an integrated understanding. This mistake in framing results in failure to ask the right questions, therefore, incomplete and fragmented solutions for an inclusive workplace. The irony is the law societies collectively have so many initiatives to eradicate discrimination they cannot fathom how discrimination can still exist in their ranks.

The cardinal limitation at the root of the contemporary legal profession’s inability to attain the expected positive benefits from higher levels of diversity is the conventional vision regarding the purpose of a diversified workforce. From the vantage of its liberal universalism, managing the increasing and insistent diversity challenge presented by “global modernity” (see Dirlik 2003) entails clearing the field of all colour-impediments (and other biology-based prohibitions) to entry and post-call professional practice, and opening up the doors of law schools and law societies to those groups who have been traditionally discriminated against and under-represented. However, insofar as this is framed as a problem of equal access (formal equality) as opposed to equitable participation (substantive equality), it tends to precipitate disparities in race relations rather than resolve them. What is suggested here is that true diversity goes

beyond increasing the number of visible (and other) minorities in the ranks of the legal profession; and should actually be understood as *the varied perspectives and approaches to work* that these minorities bring to the table.

**Table 1**  
**Number of Aboriginal and Visible Minority Lawyers,**  
**Compared to their Communities, Ontario, 2001**

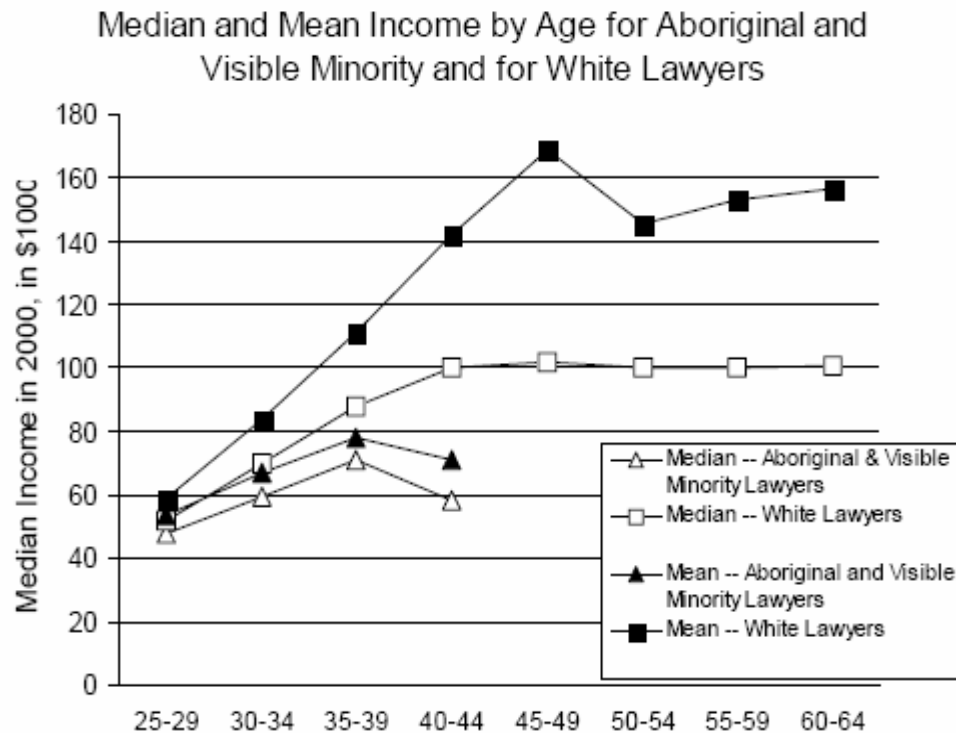
Group	Lawyers	Total Ontario Population	Total Labour Force	University Graduate Labour Force	Lawyers	Total Ontario Population	Persons per Lawyer
<b>Aboriginal</b>	0.6	1.61	1.39	0.46	175	180,625	1030
<b>Total Visible Minority</b>	9.2	19.03	18.17	25.78	2,535	2,137,665	840
Black	1.8	3.69	3.47	2.39	490	414,965	850
South Asian	3.1	4.93	4.70	7.71	865	553,395	640
Chinese	2.1	4.19	3.95	7.61	590	471,010	800
Southeast Asian	0.2	0.74	0.66	0.42	45	82,975	1840
Korean	0.3	0.51	0.49	1.11	70	57,030	810
Japanese	0.3	0.23	0.20	0.44	80	25,855	320
Filipino	0.3	1.40	1.57	2.58	75	157,290	2100
Latin American	0.2	0.91	0.94	0.57	65	102,500	1580
Arab	0.4	0.78	0.64	1.18	100	87,860	880
West Asian	0.2	0.58	0.55	0.94	45	65,145	1450
Other Visible Minority	0.2	0.69	0.68	0.39	60	77,225	1290
Multiple Visible Minority	0.2	0.38	0.32	0.46	50	42,415	850
<b>White</b>	<b>90.2</b>	<b>79.36</b>	<b>80.44</b>	<b>73.76</b>	<b>24,855</b>	<b>8,913,525</b>	<b>360</b>
<b>Total</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>27,565</b>	<b>11,231,820</b>	<b>410</b>

Source: Statistics Canada, 2001 Census  
Found in Ornstein (2004: 4)

**Table 2**  
**Representation of Aboriginal and Visible Minority Peoples in Law, Compared to**  
**Other Professions and Managers, Ontario, 2001**

Group	Lawyers	University			High	Middle
		Physicians	Engineers	Professors	Level	Managers
					Managers	
Percentage						
Aboriginal	0.6	0.3	0.4	0.5	0.7	0.9
Total, Visible Minority	9.2	25.9	27.3	15.2	11.2	15.7
Black	1.8	1.8	1.8	1.7	1.2	1.8
South Asian	3.1	9.6	7.0	4.2	3.5	4.0
Chinese	2.1	7.7	9.6	4.7	3.2	4.3
Southeast Asian	0.2	0.7	1.0	0.3	0.1	0.4
Korean	0.3	0.7	0.7	0.5	0.4	1.2
Japanese	0.3	0.5	0.4	0.6	0.6	0.3
Filipino	0.3	0.9	1.4	0.2	0.4	0.8
Latin American	0.2	0.4	1.0	0.7	0.2	0.6
Arab	0.4	1.9	1.9	1.0	0.8	0.9
West Asian	0.2	0.7	1.5	0.9	0.5	0.7
Other Visible Minority	0.2	0.6	0.5	0.3	0.3	0.6
Multiple Visible Minority	0.2	0.3	0.4	0.1	0.2	0.3
White	90.2	73.9	72.3	84.3	88.1	83.4
Total	100.0	100.0	100.0	100.0	100.0	100.0
Number	27,565	25,990	95,130	19,245	87,405	639,730

Source: Statistics Canada, 2001 Census  
 Found in Ornstein (2004: 13)

**Table 3**

Source: Ornstein (2004: 31) Changing Face of the Ontario Legal Profession, 1971-2001

### Method and Scope of Analysis

This study gets its methodological direction from interviews and other ‘first order’ accounts of racialized lawyers. It also employs the analytic stipulation introduced by Stuart Hall (1980a, 1980b) that the modern body is no longer theorized in terms of who people are (biology) but rather in terms of what people do (culture). From this perspective, the old biological dominance orientation and genetic chain-of-command in the legal sector workplace has been transformed into a new cultural dominance orientation. So, today, racialized lawyers are not excluded from the profession on the basis of race, they tend to be nullified from within on the basis of institutionalized standards of cultural competence. Accordingly, this work challenges the biogenetic focus and the lingering presumptions underlying race relations in the contemporary legal profession that act to focus attention on overt colour-barriers to entry and professional membership as the starting place to define policy options and reach workplace decisions on equity.

This analysis will show that the contemporary equity struggles within the legal profession are related to a sophisticated and subtle cultural politics, involving the labor market segmentation of racialized lawyers, which operates on the basis of a *new social nullification of different-ness*, rather than racial intolerance. Hence, visible minorities are no longer widely portrayed as genetically inferior as in the past, but the dominant “Whitestream culture” (see Grande 2004) still often perceives non-White cultures as institutionally backward, which can lead to skills discounting and accreditation blockage in the workplace. In this regard, this study will show how the legal profession ideologizes dominant cultural narratives on such things as workplace ‘comfort level(s),’ and ‘familiarity,’ and ‘personal suitability,’ and ‘picturing-the-right-person-in-a-setting’ in the conventional discourse on hiring qualifications and credentials. These discourses are further manifested in detrimental practices – such as, ‘diversity targets,’

‘streaming,’ the ‘perpetual foreigner syndrome,’ and ‘lawyering while Brown’ that contribute to the miniaturization of racialized lawyers and the casualization of their work— which, in turn, function as strategies to preserve the status quo of White privilege. Here, the cultural dominance grid is superimposed over the old biological dominance grid in a way that maintains social hierarchies, but without all of the messy and illiberal genetic implications.

Unlike overt racism, the new social nullification of different-ness involves those programming standards and values that continue to deny or exclude the ‘other’ by naturalizing the norms of those in positions of power and privilege, and its inevitability. This has the effect of flattening diversity, while privileging Whitestream norms as necessary and superior. So, while the liberal legal establishment in Canada will no longer abide overt racism or colour-barriers in the licensing and post-call hiring processes, it does sanction the devaluation of worth through de-credentialism, and other invalidations of immigrant skills, racialized experience and work habits.

Erving Goffman’s (1963, 1986) early work on “the normal and the stigmatized” is also instructive in this regard. Goffman (1986: 128) argued that in the modern West there is a typical image of a male— i.e., White, urban, fully employed, young, married etc.—which every male has to live up to, and if they do not qualify in any of these ways, they tend to be viewed, and often view themselves, as incomplete or inferior. The processes of control and normalization within a differentiated or multicultural society reflect a dominant White imaginary, where the normalization of ‘the pale male’ serves as the standard for the ‘ideal citizen’—which permeates throughout the major social institutions of society, including the workplace. In this respect, Goffman (1986: 138) held that “[T]he normal and the stigmatized are not persons but rather perspectives” related to shifting sets of social practices and circumstances. Accordingly, contemporary society’s paramount reality represents a circular field, with the hierarchy moving from the powerful centre (composed of ‘White’ males) to the less powerful periphery (composed of the ‘others’). The ‘others’ however are not simply dominated, but are forced to compete with each other for a place closer to the centre.

The contemporary legal establishment in Canada is amenable to multicultural diversity *but* only within a pre-existing framework. Here, individuals and groups are held in a competitive and self-perpetuating hierarchy, in which differences are subject to intense assimilationist pressure that serve and preserve the consensus of the status quo. As Stuart Hall (1980a, 1980b) writes, the central way professionalism is organized in contemporary society is through the “language of culture.” Professionalism as culture is predicated on the principal that the cultural “other” is distanced from or irrelevant to the mainstream. It is the contention of this study that the language of culture in the field of Law operates within a framework of power, institutions and political economics that gets lost and covered over through the naturalization of White privilege. The elite legal establishment invokes the language of culture as an evaluative framework for circumscribing debates about the political economy of the practice of law, in regard to embodied cultural competencies. In this regard, the deficiency model of difference (lawyers of colour as having deficits) has become a self-evident resource for explaining disparities in the labour market results of people of colour in general, and immigrants of colour in particular, that covers over the cultural processing of modern market reality. Thus, the contemporary practice of Law in Canada is based on a division of labour where culture has become a market factor that holds individuals and groups in a competitive and self-perpetuating hierarchy that justifies the differential power relations of lawyers of colour as a market contingency, rather than a political action. The following sections illuminate how the principle of justice and equity interacts with cultural forces to shape the legal profession, in an endeavor to increase the coherence and comprehension necessary to implement sound public policy on workplace diversity.

**From the White-Settler Colony Mentality to Global Modernity:  
'Biological Domination Orientation' Versus 'Cultural Domination Orientation'**

*Delos Rogest Davis has the distinction of being the first Black lawyer in Canada. Records indicate that this achievement was in no small measure the culmination of a journey which began long before he was called to the bar, with the unflagging resolve of a father determined to escape the shackles of slavery in order to make a better life for his children.*

*In 1850, as a refugee slave from Virginia, James Davis, father of Delos, traveled via the Underground Railroad to Canada's Colchester Township in southwestern Ontario, in search of a freedom that once seemed beyond his reach. As a man finally unshackled from bondage, the elder Davis vowed that his children would not suffer the fate of being enslaved by ignorance in their new homeland. He retained a private teacher to instruct Delos and his siblings until a school could be built. Instilled with a passion for knowledge, Delos eventually managed to obtain a teaching certificate and began a career as a school teacher that lasted four years. Finally, inspired by his own father's strength of purpose, Delos made the decision to pursue his life's ambition to earn a law degree and enter the legal profession, even while this new destination seemed beyond reach.<sup>v</sup>*

*By 1871, Delos had acquired enough legal training to be appointed commissioner for taking affidavits. Two years later he was appointed a notary public. But a colour-coded "catch 22" prevented him from becoming a bona fide lawyer. Since the Law Society of Upper Canada required individuals studying law to article for a period of time with a lawyer prior to taking the entrance exams for admission to the bar of Ontario – and no lawyer in Ontario would hire a Black man to article under them – Delos was effectively shut out of the profession.<sup>vi</sup>*

*In the end, it took a groundbreaking "special act" of the Ontario Legislature (a private member's bill boldly introduced by the Liberal "Speaker of the House," William Douglas Balfour) before Delos could finally enter the profession. This act provided that Davis was permitted to take his final law examination in order to obtain admission to the Law Society of Upper Canada, notwithstanding the fact that he had not complied with the articling requirements of the Law Society. On May 25, 1884, "an act to authorize the Supreme Court of Judicature for Ontario to admit Delos Rogest Davis to practice as a solicitor" received Royal Assent. On taking the examination, Davis stood first in the class of thirteen candidates. On November 15, 1886, he was admitted to the Ontario bar.<sup>vii</sup> Davis was named King's Council in 1910, the year after he retired from practice.*

*During his distinguished career as a criminal lawyer in Canada, Delos Rogest Davis was counsel in six of the leading murder cases in the county, defending five and prosecuting one, winning every case.*  
<sup>viii</sup>

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Until the 1960s, application for admission to the Ontario Bar from lawyers qualified to practice in other jurisdictions were rare. The MacKenzie Report (1997: 11) noted, "[O]n the infrequent occasions on which a lawyer qualified to practice in Great Britain, the United States or Australia applied for admission, the question was decided by the Dean of Osgood Hall Law School over a cup of tea."

This gentility and breeding fit comfortably within the "White-settler colony" mentality (see Abelle and Stasiulis 1989; Stasiulis and Jhappan 1995) and pre-1960s preferential immigration selection policies that guaranteed the bulk of newcomers, and so immigrant lawyers, would remain of European stock. While Canada never had a formal 'Whites Only' immigration policy (as Australia had, for instance), non-Whites clearly came to 'know their place' (that is, that Canada was not their place) through the implementation of a series of race-based immigration practices—such as the 'head tax' on Chinese immigrants; the 'continuous journey' provision on immigrants from several South Asian and African countries (knowing well that there were no ships plying directly between those continents); and the 'climatic inadmissibility' provisions prohibiting the immigration of Blacks from the United States and the Caribbean countries on the grounds that the Canadian winter would be too harsh on them.

The White-settler colony mentality in Canada was associated with the 19th century theory of “social biology” (see Wilson 1975) or “Social Darwinism” (see Hawkins 1997), which defined society as a product of natural selection and linked the division of labour to bio-genetic programming. In this perspective, genes or biology formed the basis for entitlement and evaluation. Accordingly, in coveted professional workplaces like the Law, the justification for the exclusion, exploitation and denial of individuals along the lines of race and gender was based on perceived intellectual and moral qualities attached to ‘the body.’ Indeed, the notion of biology-as-destiny or “biological determinism” (see Lewontin 1991) transformed race-based and gender-based differences into a pecking-order that ranked group members along a social continuum by virtue of their inclusion into predefined body-categories (see Fleras, 2005: 73). Genetic explanations of social structure justified the prevailing race and gender inequities in society, while serving to maintain the hegemonic order of White-maleness in Canada’s political economy. In this connection, social biology signified worth through corporeal representation, and provided the theoretical foundation for “social/occupational closure” (see Weber 1978: 339-48; Gould 1980; Alcock 2001) in the professional workplace. This had the general effect of perpetuating the dominance of White economics, legitimizing the existing bio-social inequities, and congealing conservative political ideas into a “vertical mosaic” (see Porter 1965: 366-385).

In the profession of Law, the old White-settler colony mentality created a “labour market shelter” (see Freeman 1976:114-16) for White males, and inhibited the career—and class—mobility of people of colour, and women of any colour. The original canons with regard to professional standards and regulations in the field of Law were dominated by biological quality-control issues in the sense that it was taken for granted that some groups or categories of people possessed a genetic aptitude for legal expertise and some did not, resulting in practice restrictions on the basis of race and gender. Rationalized as the protection of the integrity of the occupation, biogenetic programming ensured the “social reproduction” (see Bourdieu and Passeron 1973; Hage 1998) of a pale male elite, facilitating the intergenerational transmission of class privilege along racial lines. Through a body-rhetoric of ‘quality assurance’ (biogenetic programming for the public interest and consumer protection), the legal establishment in Canada was able wrapped itself in discursive formations that generally circumscribed and concealed the colour and gender politics of the industry.

The odyssey of Delos Rogest Davis to become the first Black member of the Law Society of Upper Canada in 1886 is representative of the discriminatory body-language that has historically faced minority groups in the legal profession, and is the precursor of Canada’s modern foreign credentials recognition crisis. Consider that it would require another decade after Delos Davis was called to the bar, and another special act of the legislature before Clara Brett Martin crossed the gender-line to become the first White female lawyer in Canada and the British Empire. Even with admittance to the bar in 1897, it is reputed she did not often enter court because her very presence in the court room caused too much of a commotion.<sup>ix</sup> Other visible minority groups were categorically excluded from the legal profession as well. For instance, it was not until 1945 that Kew Dock Yip—who help to bring about the repeal of the Chinese Immigration Act—became the first Chinese member of the bar (Con *et al.* 1982: 205). In 1946, Greta Grant (Wong) became the first Chinese women lawyer in Canada and eventually would go on to set up the legal aid system in London Ontario (Sugiman 1992: 59-66). It was 1962 that Alfred Scow became the first Aboriginal man allowed to graduate from a law school in British Columbia, and the first Aboriginal person in Canada to be appointed as a judge.<sup>x</sup> It was 1977 that Marion Ironquill Meadmore, from the Peepeekisis Reserve in Saskatchewan and a survivor of a church-run residential school, became the first Aboriginal woman member of a bar association.<sup>xi</sup> While it was not until 1993 that Maryku Omatsu became Canada’s very first Asian woman judge.

The Ontario Bar is no longer a Social Darwinian proposition posed over a cup of tea. Today, becoming a lawyer is more than a matter of genes and gentility. Under the auspice of equal treatment, licensing foreign trained lawyers is the now the responsibility of the National Committee on Accreditation (“NCA”), which is a standing Committee of the Federation of Law Societies of Canada and is made up of representatives from the Council of Canadian Law Deans, members of the practicing bar, and members involved with the administration of provincial law societies. The NCA evaluates all applicants, whether



Canadians with foreign legal education, foreign nationals with foreign legal education and Quebec civil law degrees, on their academic and professional profile; and applies a uniform standard on a national basis so that applicants with foreign law qualifications can apply to the Committee regardless of the common law province in which they wish to practice in Canada.<sup>xii</sup>

Certainly, the success of men and women like Delos Rogest Davis, Clara Brett Martin, Kew Dock Yip, Greta Grant (Wong), Alfred Scow, Marion Ironquill Meadmore, Maryku Omatsu and others who broke through the colour and gender lines of professional workplaces, served to critique the White settle colony mentality in the field of Law, weakening the link between biology and labour. Yet, there is a consensus in postindustrial economic theory that a series of broader developments ultimately connected with “*globalization*” (see Watkins, 2003)—and the radical reworking of the relationships between people, markets and state—have also challenged contemporary professions by vigorously shaking their institutional and ideological scaffolding (Hanlon 1997; 1998; Muzio *et al.* 2007; Muzio 2008).

In terms of economic theory, global modernity and the “new world order” (see Galbraith 1991; Fukuyama 1991) has manifested itself as a dialectic of world-wide capitalism and trans-migratory labour (see Wallerstein 1979 & 1982; Keil and Kipfer 2003; Harvey 1989) leading to the escalation of a “transnational urbanization” movement (see Miyoshi 1993; Basch, Schiller, and Blanc 1994; Satzewich and Wong 2003) in virtually all technologically advanced societies. So, like other postindustrial/knowledge-based nations, Canada is now engaged in the global competition for footloose capital on both the financial and human side—principally drawn to the “global cities” (see King 1990; Sassen 1991) of Toronto, Montreal and Vancouver. Moreover, as well as being distinguished by an increasing influx and trend toward knowledge workers, these newcomers are now predominately from non-White source countries.<sup>xiii</sup> Over the period from 1996 to 2005, for instance, visible minority source regions (namely, Africa and the Middle East, Asia and Pacific, and South and Central America) have accounted, on the average, for close to 80 percent of annual immigration to Canada (Citizenship and Immigration Canada 2006:26).

In this respect, globalization and the new knowledge-based economy has unleashed a “transnational brain drain” (see Sassen 2000; Sennet 2006; Foster 2008) of a cosmopolitan/Third World intelligentsia to knowledge-based occupations in First World countries like Canada, that has transformed the workplace into something of a “contested terrain” (see Edwards 1979). Research on the contemporary postindustrial workplace now recognizes that these powerful economic and ethnoracial forces associated with globalization continue to press the professions to re-tool the old biogenetic recipes for occupational closure, and develop new patterns of organization and modes of operation more appropriate to a differentiated world. This global diversity challenge has involved the sacrifice of some long held practices and arrangements; yet, at the same time, it has allowed professionalism in Canada to be reconstitute and re-branded under the auspice of a White “cultural hegemony” (Gramsci 1992), or cultural-dominance orientation, in order to defend traditional privileges and rewards (see Muzio *et al.* 2007; Muzio 2008).

Antonio Gramsci (1992) was one of the first to suggest that researchers need to understand the language of culture in global modernity, in terms of how the dominant culture structures ideology and produces social practices, for the purpose of shattering the mystification of the existing power relationships and social arrangements that sustain them. Gramsci’s theory of cultural hegemony is based on the notion that the supremacy of a social group manifests itself in two ways: as domination and as intellectual and moral leadership. As Gramsci viewed it, cultural hegemony is about the interdependence of force and consent, power and values, and how in a modern context they work together in a reciprocal way to reinforce each other. He argued, with the rise of modern science and information technology, social control has been exercised less through the use of physical deterrents and increasingly through the distribution of an elaborate system of norms and imperatives. Unlike fascist, or totalitarian, or repressive military regimes—which control primarily through physically coercive forces and arbitrary rules and regulations—advanced societies utilize forms of hegemonic control that function systematically by winning the consent of the subordinated to the authority of the dominant culture.

One way to achieve this consent—as Stuart Hall (1996) later extrapolated—is through *cultural accommodation*. In this, hegemonic culture draws bits and pieces of other cultures in without allowing them to dramatically impact central ideas and beliefs. The contemporary practice of law in Canada has (at least partly) been reconstituted through a cultural accommodation to global modernity based on a version of, and commitment to, *equality of treatment* (standing as the epistemological and ontological foundation for occupational membership and social justice). This type of ‘formal equality’ perspective focuses on a belief in a system of open access to social institutions and services, and envisions a society based on competitive and difference-blind meritocracy. Here, the goal of managing the profession’s and society’s multicultural diversity is not to create an inclusive workforce and social parity in institutions, but rather, to foster a natural hierarchy based on merit determined through competitive market forces. This version of equality is quantitative (based on demographics) rather than qualitative (based on social equity)—focused on numbers rather than focused on embracing different perspectives and approaches to work.

The contemporary legal establishment seeks to absorb and incorporate a transnational workforce into a framework of equality of opportunity and occupational integrity. Meanwhile, because this particular conception of equality accentuates *equal access as opposed to access as equals*, it has the practical and structural effect of loosening entry level social controls allowing more racialized and immigrant lawyers into the profession, all the while tightening the controls of occupational mobility by ignoring racialized disparities in the political economics of law practice. This fits well within the theory of cultural hegemony, which suggests that the traditional-professional elite (predominately White males) can accommodate or concede narrow economic interests to a select and expanding cohort of rank-and-file professional practitioners (predominately racialized [and female] lawyers) as one way to preserve its position in the economic mode of production itself.

Shibao Guo and Per Andersson’s (2005) recent comparative study of immigrant professionals in both Canada and Sweden is instructive in this regard. Their study argues that applying the *one-size-fits-all* criterion in the measurement of immigrants’ credentials and experience, is associated with an ontological commitment to positivism and liberal universalism, which actually denies immigrants opportunities to be successful in a new society. In this regard, a liberal or open immigration context, which says ‘we are all the same’ or ‘we aspire to be all the same’, can lead to a belief that the knowledge of immigrant professionals, particularly those from the Third World, is incompatible and inferior, hence invalid in First World countries. The researchers found that this classic devaluation and denigration of immigrant professionals’ prior learning and work experience after arriving in their new country is based on an epistemological misperception of both *difference* and *knowledge*. The study comes to the conclusion that the juxtaposition of misconceptions of difference and knowledge with positivism and liberal universalism forms a new head tax to exclude the ‘undesirable,’ and to perpetuate oppression.

In the practice of Law, the one-size-fits-all model emanates from a rhetoric of ‘credentials’ and ‘competence’—which, as we shall see, finds expression in various cultural narratives on ‘formal equality’ (equal treatment as opposed to equal outcomes; ‘we are all the same’ as opposed to ‘valuing differences’)—that in reality often fails to seriously embrace difference, and has become an entrenched and reliable strategy for the social reproduction of the pale male professional elite. Not only does the one-size-fits all criterion insist that everyone is the same, but with its emphasis on equal treatment and difference-blindness, it puts pressure on racialized lawyers to make sure that they conform to established convention and standards, under the threat of cultural stigma and invalidation.

Under the auspice of equality of treatment (and an open-access-and-difference-blindness paradigm), numerous and varied strategies to increase diversity, and absorb a transnational workforce in the field of Canadian law, have been under way for more than two decades.<sup>xiv</sup> Law societies and regulatory bodies and associations and many legal employers have been expressly committed to plethora of initiatives designed to redress licensure and post-call hiring barriers for those racial and other minority groups who have been historical disadvantage and under-represented. Some of these include voluntary bridging programs,<sup>xv</sup> model workplace protocols,<sup>xvi</sup> equity model policies, model policies on harassment and discrimination,<sup>xvii</sup> model policies on interviewing guidelines,<sup>xviii</sup> supporting law school student associations,<sup>xix</sup> guidelines for “racially inclusive and gender-neutral communications,”<sup>xx</sup> contract

compliance policies,<sup>xxi</sup> Equity Public Education (Series), Equity Ombudsperson positions or Safe Counsels as well as Discrimination and Harassment Counsels (DHC),<sup>xxii</sup> “accommodation requirements”<sup>xxiii</sup> for persons with disabilities, and “alternative work policy”<sup>xxiv</sup> procedures.

There is no doubt that such strategies for increasing demographic diversity have made some important in-roads toward promoting fair treatment. Still, evidence of continuing occupation cleavages between White and non-White lawyers indicates that thinking of diversity simply in terms of identity-group representation has significant limitations. In fact, many of the attempts to accommodate diversity in the legal workplace from an equal treatment perspective have backfired, sometimes even heightening ethnoracial tensions and divisions, and increasing racial polarization.

Jim Middlemiss (2007) recently noted in *Legal News* that this internal polarization has resulted in a proliferation of ethnoracial legal associations

For a profession that's always preaching diversity and accommodation I find it interesting that ethnic groups find it necessary to form their own law associations, as opposed to working within existing organizations to promulgate change ... One must assume, they don't find our mainstream organizations accommodate enough of their needs. It's a pity that race and ethnic background is still a distinguishing issue in the practice of law in Ontario.

In dispelling the White-settler colony mentality, former Governor General Adrienne Clarkson (2003: 10) has decisively asserted that Canada is now characterized by the creation of “a new citizenry” that has transformed the biological dominance orientation into a multicultural framework that demands respect for diversity and inclusiveness. This is a belief that is shared by thoughtful and forward-looking people both inside and outside of the legal profession. However, contrary to this demand for what might be called a “thorough-going multiculturalism” (coherent in the expression and implementation of diversity), a closer view of the practice of Law indicates that the old bio-programming and body language has progressively given way to a “consensus multiculturalism” (Fleras, 2003: 296-98) that focuses on inclusiveness *but* only within a pre-existing framework. In order for the legal establishment to truly embrace and participate in the creation of Canada’s new citizenry, it needs to grasp what to do with diversity, once the numbers are achieved, to make the most out of pluralism.

### **The New Social Nullification of Different-ness in the Legal Service Sector: At the Situational, Institutional and Paradigmatic Levels**

In the Canadian legal profession, the old body politics of racism and colour-hierarchy has been replaced by a cultural politics of the body that acts to preserve the consensus and status quo of White privilege, but without the old illiberal sentiments. Indeed, as Grania Landon-Down (2006) writes

Leading law firms are not full of racists. These people are generally too intelligent to hold such prejudices. If someone is going to make them money, they will recruit them. [Today] It's more about class and culture than outright prejudice, about how they think someone will fit in.

If you don't get a job in a major law firm—to paraphrase Landon-Down—it is not usually because of your race anymore, but rather, because you don't “*fit in*.”

So, it is not the colour but the fit. Still, the relationship between colour and fitting-in is left unexamined. Here, the body language of genetic superiority is typically treated as passé, and even dangerous. But the language and politics of culture often functions to invalidate the background cultural experience, and nullify the career aspirations, of lawyers of colour. At the same time, fairness and equity are typically framed as a problem of eliminating the last remnants of a biological dominance orientation, while leaving the cultural dominance orientation of the profession untouched and unproblematic.

Simply stated, the contemporary practice of Law presents a cultural problem complex today that is typically and inadequately framed in terms of biology-centred solutions. It is this cognitive blind spot embedded in the contemporary legal profession, concealing the tension between cultural practice and biology-oriented solutions, which leads to continuing contradiction and paradox. Multicultural inclusiveness remains elusive because it is linked to the policy of increasing numbers or demographic variation, primarily achieved through the elimination of the overt racism and blatant barriers to occupational entry and professional membership. By presupposing the old, biogenetic calculus of domination and exclusion, the legal establishment 'overshoots' the more subtle rules and practices that culturally invalidate the aspirations of racialized lawyers for equity.

This was recently illuminated by members of the Canadian Association of Black Lawyers (CADL).<sup>xxv</sup> In January 2005, members of the CABL examined the historical evolution of race relations in the profession, approaching the 120th anniversary of Delos Rogest Davis breaking the colour-barrier. The event was attended by approximately three dozen young lawyers who gathered in Toronto to specifically address what they viewed as a collective problem of "articling placements and post-call hiring"—the catch-22 barriers preventing them from practicing the type of law they want and, in some cases, driving them out of the profession. Many licensed lawyers in the Black community, for instance, feel shut out almost entirely from corporate and commercial law, which accounts for about 65 per cent of new jobs (Tyler 2005). In the supportive and reflective environment of the seminar, some wondered aloud if senior partners of law firms are worried big business clients will feel uncomfortable having too many members of visible minorities sitting in on meetings and orchestrating their deals, or just can't picture them in that setting. Meanwhile, although there are more than 38,000 lawyers in the province of Ontario, less than 2% are Black and there are just four Black partners at major Ontario law firms—a number counted on one hand. Across Canada, there are less than 25 Black judges at all court levels. And there are only about 10 tenured law professors at 21 law schools in Canada (Tyler 2005).

In the era of globalized law practice, legislation now requires that the legal profession develop and maintain standards for entry that are transparent, objective, impartial and fair.<sup>xxvi</sup> Yet, racialized lawyers are cognizant of the fact that hiring decisions are often made on less objective bases, in terms of more subtle situational judgments and biased attitudes that reflect a cultural-dominance orientation—like 'corporate comfort level,' or 'familiarity' or 'personal suitability,' or simply 'picturing the right person in a setting.' This language and politics of culture in the legal profession refers to the new nullification processes that often function to invalidate and marginalize the career aspirations lawyers of colour. Hence, in the face of entrenched equal rights legislation, this language of culture still denies the right to be equals.

The new social nullification process in the legal profession is consistent with research on modern forms of prejudice which indicate that blatant corporeal discrimination is now often suppressed by societal and personal norms and values. As a result, discrimination will not usually occur unless it can be explained away as being based on something other than prejudice (Crandall and Eshleman 2003; Dovidio and Gaertner 2004). Contexts in which this is facilitated are those where the norms and rules for appropriate behavior are ambiguous or where justifications for the differential treatment—other than prejudice—are readily available (Esses *et. al.* 2007: 116). Here, colour is not purged from the mainstream definition of social reality; it is recast into cultural differences within a cultural interpretation of the institutionalized labour market process. The cultural grid in contemporary society is superimposed over the biological (the body). So the old biological chain-of-command is transformed into a cultural chain-of-command, where acts of discrimination have plausible deniability.

Similarly, a recent study examining prejudice in the workplace argues that discounting the credentials of visible minority immigrants may often appear as legitimate rather than as a manifestation of prejudice. This study conducted by Victoria Esses, Joerg Dietz, Caroline Bennett-Abujaytyash and Chetan Joshi (2007) suggests that in many cases the rules and norms for assessing foreign credentials are unclear, creating ambiguity about the true value of these credentials. Moreover, the 'foreignness' of qualifications can be used as a seemingly legitimate justification for failing to take into account the full value of the qualifications of visible minority immigrants, and perhaps leading to uneven and arbitrary

assessment at the institution level. This research concludes that, while individuals who make hiring decisions and assess the quality of applicants' credentials may consciously try to avoid bias and discrimination in decision-making, subtle prejudice may still influence their behaviour. Overall, discrimination against visible minorities may occur without being recognized as such by individual decision makers or by other individuals within or outside of organizations. Nonetheless the very subtlety of these biases may allow those who discriminate on the basis of their cultural biases to confidently believe they are deciding objectively, instead of being bound by conditions and contingencies of their own culture (Esses *et al.* 2007).

There are other levels of foreignness and forms of racialized social nullification that relate to a multicultural paradox in the practice of law. At the Federation of Asian Canadian Lawyers (FACL) in Action 2nd Annual Fall Conference, held at the Flavelle House, University of Toronto on November 8, 2008, Justice Mavin Wong of the Ontario Court of Justice identified her experience of social nullification in terms of the "perpetual foreigner syndrome" (Wu 2001). Justice Wong practiced criminal law for fourteen years before being appointed to the bench in 2000. She spoke candidly about discrimination against Asian lawyers, in particular against female Asian lawyers, noting that she has been mistaken as an interpreter by a judge, has been referred to as "missy lawyer," and was even asked to translate for her Vietnamese client in court, despite not speaking the language.

Another level of foreignness and multicultural paradox is related to the increased public surveillance and disproportionate suspicion surrounding particular racialized communities in the wake of 9/11. Harini Sivalingam has articulated the birth of a kind of "lawyering while Brown" syndrome. Following the tragic events of September 11, 2001, there has been an intensity of public surveillance in the lives of particular segments of society related to the fact that they are identified with newcomer or immigrant communities of color. At the Federation of Asian Canadian Lawyers (FACL) in Action 2nd Annual Fall Conference, Sivalingam described her experiences as a lawyer and member of the Tamil Canadian community, particularly in regard to the backlash and the frequent and unfair stigma of the terrorist label directed towards the community. She notes that post-9/11, there were new barriers to accessing legal strategies, especially with the dismantling of the Court Challenges Program, and that most of the community's response was in the area of political advocacy and community organizing, including over displays of Canadianism. In one specific example, the community fought against one newspaper's policy on the use of the label "terrorist" in association with Tamils. After initial unresponsiveness, there has been some recent success in building a relationship with the mainstream media and the use of less inflammatory labels.

Social nullification processes can have indirect and cascading negative effects, particularly as it relates to minority role models. The idea of an effective role model refers to individuals who inspire others to believe that they are capable of high accomplishment by serving as templates, symbols and nurturers. In this regard, Stuart Hall (1976) argued that the discounting of credentials and accreditation blockage imposed on foreign-trained professionals can have deleterious consequences for all visible minority youth whose parents were trained abroad: "[I]t sets limits to the likelihood that minority professionals could serve as effective role models for succeeding generations," and so, conditions succeeding generations to accept a cycle of social nullification and stigma. These dynamics were recently illustrated at a one-day open house held at the University of Toronto and sponsored by U of T chapter of the Black Law Students' Association (BLSA). The BLSA brought more than 70 young Black high school and undergraduate students together with Black legal professionals as a way of encouraging Black youth to pursue professional studies at the Faculty of Law. One of the co-chairs (of the BLSA), Moya Teklu remarked that it wasn't until she got to law school that she had the opportunity to meet any Black lawyers. "A lot of Black youth don't know Black legal professionals and they don't see representations in the media."<sup>xxvii</sup> Without 'same-kind' role models, minority students have been commonly found to experience a sense of abandonment, which is directly related to a tendency for under-achievement and their high attrition (Allen 2006).

Finally, Joanne St. Lewis—a University of Ottawa law professor and the first Black woman elected to the governing council of the Law Society of Upper Canada—contextualizes the experience of

the new nullification of different-ness in the legal profession as integral to the formal (as opposed to substantive) equality perspective *itself*, as manifested in institutional practices of “diversity targets” and “streaming”

In law schools ... it's easy to meet diversity targets by hiring a minority lawyer to teach a class, but very few have tenure or sit on faculty committees, where the real power lies. Away from the ivory towers, one major problem is that while Black law students get hired for articling positions at big law firms, they either don't get offered full-time jobs or are 'streamed' into other areas of law that don't excite them, such as litigation.” (Tyler 2005)

Even within a prestigious or ‘high’ profession like Law, lawyers of colour are disproportionately subjected to the casualization of their work, and consigned to contract positions that often merely fulfill minority target objectives (like teaching a law class at university). In addition, many legal employers, using the open-access-and-equal-treatment paradigm, have diversified only in those areas in which they interact with particular niche-market segments (such as litigation). In time, many lawyers of colour recruited for this function by major or established law firms have come to feel devalued and exploited as they begin to sense that opportunities in other parts of the organization are closed to them. Also many of these lawyers of colour say that when companies have needed to downsize or narrow their practice-marketing focus, it is their lower-earning specialty departments that are often the first to go. Related, many lawyers of colour have expressed the view that one of the most ‘fundamentally irritating’ developments of the moment is a move by large law firms without significant minority representation to create positions for their lawyers to do “pro bono” work for disadvantaged communities, including minorities, when law firms really need to deconstruct their culture and hire lawyers from those very communities (Tyler 2005).

Lawyers of colour are now predominately disadvantaged through mediation of a cultural dominance orientation, where subtle and more inconspicuous social nullifications have replaced overt manifestations of racism. The language and politics of culture in the professional workplace ideologizes narratives on ‘comfort level,’ and ‘familiarity,’ and ‘personal suitability,’ and ‘picturing the right person in a setting’ that are manifested in practices—such as, ‘diversity targets,’ ‘streaming,’ the ‘perpetual foreigner syndrome,’ and ‘lawyering while Brown.’ These cultural narratives and practices are further entrenched by legitimizing discourses on ‘credentials and competencies’—which function to ensure that the field of Law remains a site of social reproduction of the Whitestream elite, particularly to the upper echelons of the profession.

### **The Rules of Competent Practice and the Public Interest: A Narrow and Broad Perspective**

Even with “fairness” legislation in place in Ontario and other jurisdictions, lawyers of colour typically recognize important aspects of the licensure and accreditation processes as both arbitrary and culturally contingent. Xiaojun Ma, a sole practitioner in Toronto, spoke at the Asian Canadian Lawyers in Action Conference (2008), about how the barriers of culture in the licensure and registration process, actually became assets of her law practice

I had received my LL.B. and LL.M. from two leading institutions in China where she grew up, as well as an LL.M. from the University of Nebraska; and I became a member of the New York Bar before immigrating to Toronto in 1998...where I completed the requirements of the National Committee on Accreditation and was called to the Bar in Ontario in 2002.

The most difficult part of the whole process was finding an articling position. I did not have access to any information about the articling process, and most articling positions were filled by the time I started my search. I had no information, no connections, and a language barrier ...

Employers were hesitant, and there was no time for explanations...None of the students in my cohort found a position ...

In my practice now, many of the barriers to become registered as a lawyer in Canada became very attractive to clients – language, cultural background, and understanding clients' needs. In my law practice now, I am proud of being an educator introducing legal information to the community.

Xiaojun Ma informs us that racialized lawyers frequently make decisions and choices at work that draw upon their cultural background—choices made because of their identity-group affiliations. In this respect, the new social nullification process in the legal sector is not only situational and institutional, it is also paradigmatic. For instance, while racialized lawyers often find that speaking English as a second language is a handicap in getting accredited; ironically it can be an advantage in the actual practice of law. This disjuncture in the system at least raises questions about the possibility of broader criteria or versions of “competency” than might currently exist, and the possibility of a multicultural context for the definition of competence. It also suggests that ‘fairness’ is not just a matter of legislating diversity into the system, but it requires putting standards in place that embrace that diversity as part of the system.

From this perspective, equality in the legal profession goes beyond the attempts to increase access to the training schools and businesses of individual's from groups who have been traditionally under-represented. It is dependent upon incorporating racialized lawyers and their communities into the definition and the sphere of competence. By limiting or inhibiting racialized lawyers ability to acknowledge openly their work-related but culturally based differences and assets, the prevailing version of competence actually undermines the profession's capacity to learn about and improve its own strategies, processes, and practices. Meanwhile, it can also keep lawyers of colour from identifying strongly and personally with their chosen profession—a critical source of motivation and self-regulation in any business environment.

By all accounts, the Faculty of Law of University of Windsor is making the strongest effort to walk the talk of diversity in the legal profession, by concretely connecting approaches to education and professional practice with true equity initiatives. The stated objective of the University of Windsor Faculty of Law admission policy is to select those students who will not only excel in the study of law, but who will also have the potential to contribute creatively and meaningfully to the law school and the community. Windsor's Admission Committee considers those experiences which tend to show that the applicant is devoted to self-improvement and involvement in the community and service to others. Contributions to hospitals, charitable organizations, religious institutions, disadvantaged and underprivileged groups and individuals, political parties and athletics will, among other activities, help to demonstrate this. As the Admission Information Brochure further states: “If the candidate is a member of a group disadvantaged for any reason, these circumstances should be made known.”<sup>xxviii</sup> Dora Nipp, member of the Federation of Asian Canadian Lawyers (FACL), affirms

I did research on law schools admissions criteria. No other Canadian university compared to Windsor. The effort required to implement Windsor's admissions policy has resulted in a diverse student population, unlike any other faculty of law. Over twenty years ago the University of Windsor pioneered a broader admissions criteria that is more inclusive of diversity. And over the years Windsor has graduate a higher percentage of racialized law students than any other university. Beginning in 1990, when its graduation class was at least ten percent visible minority.

As more faculties of law out-source the application process for expediency, or create a separate category for ‘special applications’ that ghettoize minorities, the gap compared to Windsor will become even greater. (*interview fieldnote, 25.03.09*)

The increased diversity of student populations in faculties of laws is due in part to the shift in the focus of the application process and introduction of special application categories aimed at increasing the demographic mix, that have resulted from the movement to create equal access to the profession. On the

other hand, the application process of the University of Windsor stands out among its peers because it more honestly reflects a vision of access as equals.

The difficulty that the legal establishment seems to have with a broader perspective on embracing diversity as part of the system is that standard measures of competence are seen to be the primary means of quality control for guaranteeing the public interest and consumer protection. According to the Canadian Bar Association, “[I]n this era of globalized law practice and increased mobility between Canadian jurisdictions, it will become more important to have common conduct rules for all Canadian lawyers.”<sup>xxxix</sup>

According to the Licensing and Accreditation Taskforce assembled to consider issues related to the licensing of lawyers in Ontario, the professional ranks of self-regulated institutions can (only) handle diversity if competence is the bedrock of decision-making

One of the Law Society’s most important functions is to ensure the entry level competence of newly called lawyers.<sup>xxx</sup>

From this vantage, law societies in Canada have an overriding obligation to regulate in the public interest. This implies that global modernity presents an occasion to hold the ‘rules of competent practice’ ever more firmly, which is conducive to an outlook on diversity that typically calls for assimilation—where the aim is to achieve a demographically representative workforce whose members are treated exactly the same. Not only does this perspective insist that everyone is the same, but with its emphasis on equal treatment it puts pressure on racialized lawyers to make sure that they conform to established convention and standard, under threat of de-skilling based on cultural stigma and invalidation.

A racialized member of the Bar problematized the conventional definition of competency (and the rules of competent practice) in recounting the evaluation of a candidate for ‘abridgment of articles’

...[O]f the eight hundred Chinese speaking lawyers in Ontario, very few practice criminal, or family, or public interest, or human rights law. Where you are going to find them is in general practice or corporate commercial and real estate law.

When I was on the Articling Subcommittee – all requests to abridge articles (shorting the articling period) were made by submission to the subcommittee – an application came in from an Asian lawyer who previously practiced criminal law in an Asian Commonwealth country for several years. This lawyer made a formal request to the Law Society for abridged articles due to the years of experience. The discussion around the table was that there are plenty of criminal lawyers in Toronto. But I knew I could count on one hand the number of Chinese speaking lawyers in Toronto practicing criminal law, a city with a population of 350,000 Chinese. I knew the Chinese community’s need for Chinese speaking criminal lawyers. What was missing from the discussion was the cultural and linguistic context of that request. (*interview fieldnote, 02.01.09*)

The conventional evaluation of ‘competency’ in the legal profession and its connection to the public interest is typically absent to the fact that minority communities in this country are under-served by the legal profession. Moreover, the legal establishment neither seems willing to include the needs of minority communities in the definition of public interest, nor include racialized lawyers ability to service under-served minority communities in its version of competence. Consequently, this conceptual gap can lead law schools and legal employers to neglect or disregard the racialized lawyer workforce as a key resource pool for addressing Canada’s legal services needs, particularly in regard to servicing diverse communities. Further, in an immigration context, Eric Liu (2007: 6) has argued that this results in a miniaturization of racialized lawyers that undermines and contradicts the ‘cream of the crop’ model reflected in Canada’s immigrant selection system, which serves as the key public policy for Canada’s labour force growth.

For instance, in September 2008 Convocation (the Law Society’s governing body) voted to accept the Licensing and Accreditation Task Force’s (2008) recommendation to continue the articling requirement for candidates seeking admission to the bar, and to introduce new initiatives to enhance the



licensing process. These initiatives including an online articling registry to enhance information on articling opportunities; creation of a Law Society outreach position dedicated to promoting and coordinating articling initiatives and additional job placements; a voluntary bridging program for internationally trained candidates in the licensing process to support their integration into the Ontario legal profession; streamlined articling requirements for internationally trained lawyers; and simplified administration of the program. Beginning in 2010, new lawyers are also required to complete 24 hours of continuing education during the first two years of practice. Successful completion of that course, the articling requirement and the current licensing examinations are the requirements for call to the Bar.<sup>xxxii</sup>

Today, while the legal establishment seeks to absorb and incorporate a transnational workforce into a framework of equality of opportunity and occupational integrity, racialized lawyers campaign for the opportunity to be equal. In its submission to the Law Society of Upper Canada's Licensing and Accreditation Taskforce, the Federation of Asian Canadian Lawyers (FACL) put it this way

... while the Task Force raises the problem of discrimination faced by racialized and National Committee on Accreditation (NCA) candidates, its response is not to address this problem directly but rather to suggest changes .... As a consequence, it fails to address the differential challenge that racialized candidates faced "challenges that their colleagues did not"; and NCA candidates also faced challenges in finding articling positions. (Federation of Asian Canadian Lawyers, 2008:3)

Since the inception of the National Committee on Accreditation (NCA) in 1994, foreign trained lawyers have registered their concerns about the equity and effectiveness of having to return to law school for further education in Canadian law. Foreign trained lawyers have consistently expressed apprehension that there are too few seats available to them in law schools. Among those who do get in, many have claimed that little is done to educate them in the law school environment, and they continue to feel "left out." If foreign trained lawyers do not gain admission to a Canadian law school within three years of receiving an endorsement from the NCA, they must re-apply to the NCA for another endorsement. Institutions like the University of Toronto, charge significantly more (up to two-and-a-half times) for NCA students (vis-à-vis regular students) but provide fewer services to them. On top of it all, lawyers of colour argue that if and when they complete law school educational requirements, they experience greater difficulty than White law school graduates in locating articling positions.<sup>xxxiii</sup>

Deepa Mattoo—who is now a lawyer with the South Asian Legal Clinic of Ontario (SALCO)—identifies some of the common experiences of racialized foreign lawyers and National Committee on Accreditation (NCA) students

When I applied I was not aware that I needed documents from my law school in India. Given that there are no websites or e-mail addresses for many Indian institutions, I had to return to India to retrieve these documents before continuing the accreditation process.

... Despite the specific criteria, I found the discretion to be very broad and not transparent. In fact, it can be vague and uneven, and at times it seems arbitrary.

I know one student who approached the NCA twice. The first time was told he had to write 8 exams. The next time he was told to write 14 exams, without any clear rationale for the discrepancy. This happens all the time.

What is more frustrating is the NCA won't share information for writing their exams. I had a total lack of support during my studies for the licensing exam ... I joined a 'Facebook' group and private tutorials.

And after all this there is no work ... Many have to pay for articling, or volunteer for articling, or often take 50% less in earnings ... All in all, this was the most isolating experience that I have ever had. (*interview fieldnote*, 08.11.08)<sup>xxxiii</sup>

The primary focus of the legal profession is to provide an equal access, as opposed to a level playing field, and so it ignores the nullification experienced by racialized immigrant lawyers, caused by entrenched differential power relations embodied in the licensing-and-accreditation process.

In its further submission to LSUC Licensing and Accreditation Task Force (2008), the Federation of Asian Canadian Lawyers (FACL) clearly emphasizes the perspective of lawyers of colour in regard to the need for *creative parity* (i.e., a level playing-field, as well as equal access)

FACL also recommends that the LSUC consider other changes to the articling program such as: reducing the length of time required for articles; increasing flexibility regarding what positions will be accepted as articling positions; increased flexibility in assessing applications for abridgment or waiver of articles for foreign trained lawyers/NCA students; providing incentives to employers who provide articling positions (for example, reduced membership fees); or calling on the profession to “pool” salaries for articling positions to provide an increased number of positions at lower salary ranges. (Federation of Asian Canadian Lawyers 2008:4)

The failure to directly respond to the unique challenges, concerns, and recommendations of the racialized law community is indicative of the fact that the contemporary legal profession in Canada embodies a dichotomy between a theory of equality and the practice of cultural hegemony. So, while law schools and law societies are expressly committed inclusiveness, many have become the first line of defense against truly leveraging multicultural diversity in the profession.

Because blatant forms of racism have been generally discarded in Canadian society, the social nullification of minorities in the law industry can remain under the radar and ultimately unproblematic—usually perceived as a market place factor (that is, a strict labour market issue) rather than a political action. In this respect, some researchers have observed an interesting phenomenon among White male lawyers. While many generally and genuinely express concern about diversity and representation of women and people of colour in the profession, they also feel there is a lack of real urgency to the issue, because of the belief that tolerance and equality will prevail.

In a Report to the Law Society of Upper Canada, entitled *Diversity And Change: The Contemporary Legal Profession in Ontario*, Fiona Kay, Cristi Masuch and Paula Curry (2004: 2) note that

Considerable debate revolves around the issue of diversity and discrimination in the legal profession. Some lawyers argue that, over time, the increasing representation of women and diverse groups within the profession will overcome discrimination and other barriers. This view assumes that the representation of diverse groups will continue to grow and that progressive attitudes of tolerance and equality will prevail. Yet, recent research suggests that while there is evidence of progress, ongoing bias may prevent women and diverse groups from entering the profession and advancing to positions of power where they might affect meaningful changes to the culture of the legal profession.

The sense that the Canadian legal profession is a site of progress and tolerance prevails, and seems to be based on a version of a ‘self-correcting-and-trickle-up’ theory of meritocracy. The supposition is, once the ‘kinks’ and ‘quirks’ are worked out of the legal market, particularly in immigration transition systems, diversity will eventually prevail, and the cream of the profession will rise to the top independent of factors of race or background. This also implies that any ‘kinks’ and ‘quirks’ that exist now are fundamentally market-induced, or otherwise extraneous to the integrity of the profession.

There is a fundamental inability here to accommodate or process the perspective of people of colour that market contingencies should be seen as a diversity problem, rather than seeing the diversity challenges as market problems. In this context, social equity and inclusiveness in the legal profession are just a matter of time, and not a matter of fundamental design. So, whereas people of colour tend to see “articling placements and post-call hiring” as *the* 21<sup>st</sup> century catch-22 barriers of the profession, the

profession itself tends to define the situation in terms of “challenging market place factors” and “practice realities” of a complex new economy.

The Executive Summary of The Licensing and Accreditation Task Force Consultation Report (2008:2) to the Law Society of Upper Canada offers this official view

...Ontario has the largest bar in the country, an increasingly diverse legal profession, growing numbers of international lawyers and Canadian students with law degrees from outside Canada seeking admission to the bar, and challenging market place factors that affect articling placements, post-call hiring and practice realities.

All that is missing here, is the cultural context in which standards of competency are institutionalized, the quality of foreign credentials are assessed, the articling and post-call hiring decisions are made, the discounting and de-certification takes place, and social nullification and occupational exclusion result. In this regard, individuals who make placement and hiring decisions can continue to believe they and the profession are not prejudice, but also, that visible minorities are fundamentally being treated fairly, even in the stark face of patterned disparities.

In the end, when we consider the language of culture and dynamics of power at the collective and institutional level of articling and accreditation and licensure bodies, the observations of racialized lawyers like Deepa Mattoo and Xiaojun Ma (above), inform us of the concealed and discursive ambiguity, arbitrariness, and contingency experienced by newcomers and Canadian lawyers of colour.

### Conclusion

Lawyers of colour are now predominately disadvantaged through mediation of a cultural dominance orientation, where subtle and more inconspicuous social nullifications have replaced overt manifestations of racism. The language and politics of culture in the professional workplace ideologizes narratives on evaluative criteria such as ‘comfort level,’ and ‘familiarity,’ ‘personal suitability,’ and “picturing the right person in a setting” in the discourse on hiring qualifications and credentials. Through a focus on the experiences and first-order accounts of racialized individuals in the legal services sector, I have identified several of the new social nullifications—including, ‘diversity targets,’ ‘streaming,’ the ‘perpetual foreigner syndrome,’ and ‘lawyering while Brown’—and some associated negative consequences related to the miniaturization of racialized lawyers and the casualization of their work.

I have described how the ‘open-access-and-difference-blind’ approach to diversity is linked to the policy of eliminating the overt impediments to occupational entry and professional practice based on biogenetic determinants such as race or gender. This article suggests, however, that the contemporary legal profession can be seen as an example of a culturally organized labour force and organization that is unable to attain the expected performance benefits of higher levels of diversity. The problem lies in the framing and visioning of the purpose of a diversified workforce—therefore, posing the wrong question. The question is not how to diversify the legal profession, but how to enable differences to transform how the legal profession works.

This study demonstrates how the contemporary legal establishment provides racialized lawyers equal access to the profession, but not access as equals. Today, progress in diversity is typically measured by how well the profession achieves recruitment and retention goals rather than the degree to which conditions allow racialized people to draw on their personal assets and perspectives to do their jobs more effectively. As the evidence indicates, however, simply opening law schools and professional practice to lawyers of colour does not enable the practice of law to reap the full benefits of a diverse workforce. Instead, it appears that existing assumptions about the meaning of diversity must be dispelled and abandoned before Canada can realize the true potential of its new citizenry.

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## Endnotes

<sup>i</sup>Clarkson, Adrienne – Her Excellency the Right Honourable. 2003. “Her Excellency the Right Honourable Adrienne Clarkson Speech on the Occasion of an Honorary Doctorate of Laws Degree from the Law Society of Upper Canada.” *Touchstones*, July, pp 10.

<sup>ii</sup>The Federation of Law Societies of Canada. *Mission of the Federation* <http://www.flsc.ca/en/about/mission.asp>.

<sup>iii</sup>Law Society of Upper Canada. *About the Society*. <http://www.lsuc.on.ca/about/>.

<sup>iv</sup>The Canadian Bar Association. Annual Report (2007: 23). <http://www.cba.org/CBA/about/pdf/annualreport.pdf>

<sup>v</sup>Courtesy of The North American Black Historical Museum in Amherstburg, Ontario; see also “First Black Lawyer in Canada.” *The TIMES Magazine*, <http://www.walkervilletimes.com/black-lawyer.htm>.

<sup>vi</sup>The Law Society has altered its bar admission/licensing process many times since 19<sup>th</sup> century. It is generally acknowledged that the earlier legal education system was predominantly an apprenticeship (model) system that has evolved into the university model that replaced it. Today, as opposed to being interwoven into the framework of legal education as in the time of Delos Davis, the articling program has become a bridge between the two worlds of education and practice. However articling has remained a key component of the Law Society’s licensing process.

<sup>vii</sup>Courtesy of The North American Black Historical Museum in Amherstburg, Ontario; see also “First Black Lawyer in Canada.” *The TIMES Magazine*, <http://www.walkervilletimes.com/black-lawyer.htm>.

<sup>viii</sup>“First Black Lawyer in Canada.” *The TIMES magazine*, <http://www.walkervilletimes.com/black-lawyer.htm>.

<sup>ix</sup>Famous Canadian Women. <http://famouscanadianwomen.com/famous%20firsts/lawyers.htm>.

<sup>x</sup>The Scrow Institute. <http://www.scowinstitute.ca/aboutalfred.html>.

<sup>xi</sup>Famous Canadian Women. <http://famouscanadianwomen.com/famous%20firsts/lawyers.htm>.

<sup>xii</sup>As of November 3, 2006 nine (9) jurisdictions within Canada (British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland) have fully implemented the National Mobility Agreement (2002). The Barreau du Quebec has signed the NMA, but has not yet implemented it. The NMA sets out principles that govern temporary and permanent (transfer) mobility among signatory common law provinces. It also sets out a framework for future implementation between the Barreau du Québec and the common law signatory provinces, once the Barreau is in a position to implement the Agreement. (The Federation of Law Societies of Canada. <http://www.flsc.ca/en/committees/mobility.asp>).

<sup>xiii</sup>A recent study by Catalyst (2007:34) on career advancement in corporate Canada found that “seventy-two percent of individuals with foreign educational credentials self-identified as belonging to a visible minority group; 22 percent self-identified as white/Caucasian.”

<sup>xiv</sup>See, for example, Law Society of Upper Canada. 1997. Bicentennial Report and Recommendations on Equity Issues in the Legal Profession. Report to Bicentennial Convocation. Toronto: The Law Society of Upper Canada, May. <http://rc.lsuc.on.ca/pdf/equity/bicentennial.pdf>.

<sup>xv</sup>Public Policy Forum, Improving Bridging Programs.2008. January. See online report at [www.ppforum.ca/common/assets/publications/en/bridging\\_programs.pdf](http://www.ppforum.ca/common/assets/publications/en/bridging_programs.pdf).

<sup>xvi</sup>According to the Overview of Equity Initiatives at the Law Society. The Law Society of Upper Canada. <http://rc.lsuc.on.ca/pdf/equity/factSheetEquityInitiativesOverview.pdf>, these include is summary:

- Respect for Religious and Spiritual Beliefs – A Statement of Principles of the Law Society of Upper Canada
- Sexual Orientation and Gender Identity: Creating an Inclusive Work Environment: A Model Policy for Law Firms and Other Organizations.
- Preventing and Responding to Workplace Harassment and Discrimination: A Guide for Developing a Policy for Law Firms

- Guide to Developing a Policy Regarding Workplace Equity in Law Firms
- Guide to Developing a Policy Regarding Flexible Work Arrangements

<sup>xvii</sup>The Law Society of Alberta's *Model Harassment Policy*, for instance, recommends that firms adopt a strong and clear statement of principles committing the firm to "severely disciplining" individuals found to have been engaging in conduct constituting workplace harassment, regardless of the person's seniority in the firm. Also see the Law Society of Upper Canada. 2002. *Preventing and Responding to Workplace Harassment and Discrimination: A Guide to Developing a Policy for Law Firms*. Toronto: Law Society of Upper Canada, March.

<sup>xviii</sup>The Law Society of Saskatchewan's *Policy for Equality in Employment Interviews* suggests that while most perceptions of bias are caused by miscommunication, inaccurate assumptions and different life experiences rather than hostility towards particular groups, it is nevertheless "mutually advantageous that employers be made aware of how candidates perceive certain questions and behaviours." The Society's guidelines suggest that "[I]nterview requirements must be reasonable, related to the job, and apply to all candidates equally ... [and] selection criteria should be agreed upon in advance and the same set of questions should be asked of each candidate." (See the Law Society of Saskatchewan's Policy and Guidelines for Equitable Interviews at [www.lawsociety.sk.ca/Equity/interviewGuid.htm](http://www.lawsociety.sk.ca/Equity/interviewGuid.htm)).

The Law Society of Manitoba's *Best Practices for Employment Interviews* guide similarly cautions that "when considering whether a candidate has the right 'fit' for the firm, remember that fitting in does not necessarily mean being the same as everyone else." This diversity orientation extends to the interview session as well, where it is suggested that the interview team be as diverse and inclusive as possible. (See the Law Society of Manitoba, 2002:2).

<sup>xix</sup>In this regard, the Law Society of Upper Canada has established the *Equity and Diversity Mentoring Program* designed to encourage students from diverse backgrounds – including Aboriginal and Francophone students and students from equality-seeking communities – to consider law as a career. The program offers mentoring support to law school students, students-at-law and new lawyers to help them advance in the profession. Mentors provide advice to new lawyers and share their experiences in various areas of law. The LSU also introduced *The Elders Program* in 2000 to support Indigenous law students and law graduates enrolled in the bar admission course, and provide opportunities for professional networking with members of the local Indigenous bar. The LSUC recognizes law firm support for student associations from equity-seeking communities, like the Indigenous Bar Association or the Black Law Students Association of Canada, as an effective way to raise a firm's profile and to demonstrate the firm's commitment to an inclusive profession.

<sup>xx</sup>The Canadian Bar Association has attempted to ensure that gender neutral language is used, in both official languages, in all the Association's communications since the adoption of such policy in 1994. the CBA is also committed to using respectful, sensitive, and inclusive language as it addresses issues concerning sexual orientation, racism, immigrants and refugees (Canadian Bar Association, 2003:16)

<sup>xxi</sup>The Law Society of Alberta, for example, expects that firms it retains will respect the Society's employment diversity principle, and demonstrate a "fair and representative workplace that is reflective of the greater community and where people's differences are respected and valued" (Law Society of Alberta, 2005:5).

<sup>xxii</sup>See – Overview of Equity Initiatives at the Law Society. Toronto: Law Society of Upper Canada. <http://rc.lsuc.on.ca/pdf/equity/factSheetEquityInitiativesOverview.pdf>.

<sup>xxiii</sup>The Society of Upper Canada acknowledges the benefits for firms in adopting a policy on accommodation requirements, including improved morale and loyalty, reduced absenteeism, and enhanced public image. The policy also provides a "proactive way of providing the means for members, staff and clients who require accommodation, thereby enlisting the resources of a diverse workforce and providing services to a diverse community." (The Law Society Of Upper Canada. 2005. *Guide To Developing A Law Firm Policy Regarding Accommodation Requirements*, May. Toronto: Law Society of Upper Canada, pp. 3.).

The Law Society of British Columbia's (2004: 10) report on *Lawyers with Disabilities: Overcoming Barriers to Equality* further notes the reciprocal and cascading effects of accommodation: "While the duty to accommodate imposes a responsibility on all employers, it must be recognized that the duty produces, not only costs, but also benefits. Employers who creatively accommodate employees with disabilities can gain and retain access to a valuable labour pool and improve productivity by ensuring that employees feel that their dignity and worth is respected. These employers can also access a new client group by making their premises accessible and comfortable for clients with disabilities."

<sup>xxiv</sup>Law Society of Upper Canada. 2005:10. Also see – Law Society of British Columbia. 1992. *Model Policy – Alternative Work Arrangements*. Vancouver: Law Society of British Columbia; and Law Society of Saskatchewan's *Alternative Work Arrangements: Guidelines for Law Firms*. [www.lawsociety.sk.ca/Equity/AlternativeWork](http://www.lawsociety.sk.ca/Equity/AlternativeWork).

<sup>xxv</sup>The Canadian Association of Black Lawyers (CABL) formed in March 1996, is a national network of law professionals and individuals that is committed to reinvesting in the community. The association's stated goal is to bring together law professionals and other interested members of the community from across Canada to cultivate and maintain the association of Black professionals in Canada (<http://www.cabl.ca/>).

<sup>xxvi</sup>Fair Access to Regulated Professions Act, 2006. <http://www.citizenship.gov.on.ca/english/about/bil124/b124.pdf>.

<sup>xxvii</sup>Leung, Maria Saros. 2008. *Law Students Bring Black Youth Together With Role Models*. February 11. <http://www.news.utoronto.ca/social-sciences-business-law/law-students-bring-black-youth.html>.

<sup>xxviii</sup>University of Windsor Faculty of Law, Admission Information 2008-2010.

<http://athena.uwindsor.ca/units/law/LawTop.nsf/inToc/222B6014A9A6FBF885256DCA004FE755>

<sup>xxix</sup>Canadian Bar Association. About the CBA Code of Professional Conduct

<http://www.cba.org/CBA/activities/code/>.

<sup>xxx</sup>Licensing and Accreditation Task Force Consultation Report. 2008. The Law Society of Upper Canada. January, pp 2.

<sup>xxxi</sup>Law Society confirms articling requirement and enhances licensing process. 2008. *The Law Society of Upper Canada, News Release*. September 25, 2008. [http://www.lsuc.on.ca/media/sep2508\\_newsrelease.pdf](http://www.lsuc.on.ca/media/sep2508_newsrelease.pdf)

<sup>xxxii</sup>Interim Report on the Accreditation of Foreign-Trained Lawyers. 2002. The Equity Advisory Group, The Equity and Aboriginal Issues Committee. Pp. 3.

<sup>xxxiii</sup>Asian Canadian Lawyers in Action Conference (2008).

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